Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAM B. MCQUEEN,
Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that the Takings Clause of the Fifth Amendment to the United States Constitution prescribes the following rule: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (footnote omitted).

The question presented is whether an owner has suffered a taking when he proves that a regulation deprives him of all economically beneficial use of his property without also proving that it frustrates his distinct or reasonable investment-backed expectations.

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Sam B. McQueen respectfully petitions this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 530 S.E.2d 628 (S.C. 2000) and reprinted in the appendix hereto (Pet. App.) at 1a. The opinion of the South Carolina Court of Appeals is reported at 496 S.E.2d 643 (S.C. Ct. App. 1998) and reprinted at 15a. The final order of the South Carolina Court of Common Pleas is unreported and reprinted at 35a.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 17, 2000. A petition for rehearing was denied on May 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Takings Clause of the Fifth Amendment to the United States Constitution declares, "[N]or shall private property be taken for public use, without just compensation."

INTRODUCTION

"It is *uncontested* the permit denial at issue here deprives [Petitioner] of all economically viable use of his property." Pet. App. 4a (emphasis added). This fact makes Mr. McQueen's loss "a textbook taking." *Id.* at 28a. Yet the South Carolina Supreme Court denied his claim on the sole ground that he "failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 14a. This decision creates a deep national split of authority among U.S. Courts of Appeals and state courts of last resort. For that and other reasons, fully set out below, this Court ought to grant certiorari.

STATEMENT

1. Petitioner Sam B. McQueen, a farmer, owns two noncontiguous residential lots of real property in North Myrtle Beach, South Carolina. *Id.* at 45a; R. 203–04.[1] In 1961 he paid $2500 for a lot on 53rd Avenue (Lot A), and in 1963 he paid $1700 for another lot, located five blocks away on 48th Avenue (Lot B). Pet. App. 1a, 45a. Since buying the lots he has regularly paid taxes on them, *id.* at 36a, and the assessor had valued them at $22,800 per lot when this action was brought. *Id.* at 1a. Like the surrounding lots, his property was created from backfill and sits adjacent to man-made, saltwater canals. *Id.* at 1a–2a. Virtually all of the neighboring lots have houses on them with bulkheads facing the canal. *Id.* at 2a, 37a. But Mr. McQueen's property remains in its natural state. *Id.* at 2a, 37a.

In 1977, more than a decade after McQueen bought his property, the South Carolina General Assembly enacted the Coastal Zone Management Act (Act), S.C. Code Ann. §§ 48-39-10–220 (1993). The Act is intended "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." *Id.* at § 48-39-30(A). By the time McQueen sought to improve his property, the Act made it unlawful to "fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." *Id.* at § 48-39-130(C). Violating this prohibition was a misdemeanor, which carried penalties of up to six months' imprisonment and a $5000 fine for a first offense and one year's imprisonment and a $10,000 fine for each additional offense. *Id.* at § 48-39-170(A).

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[1] Citations to "R" refer to the official Record on Appeal.

Civil penalties of $100–$1000 per day of violation could also be assessed. *Id.* at § 48-39-170(C).

In July 1991 McQueen applied with the South Carolina Coastal Council—the name has since changed to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM)[2]—for permits to construct a bulkhead[3] on each lot. Pet. App. 2a, 36a. By erecting bulkheads McQueen intended to halt further erosion to his property and that of his neighbors and to prepare the lots for single-family homes. *Id.* at 37a, 45a; R. 209. On January 21, 1992 OCRM issued a permit for Lot A, requiring the bulkhead to be placed 75 feet from the street. Pet. App. 45a; R. 223. Because of municipal setback requirements, McQueen asked OCRM to let him put up the bulkhead 90 feet from the street instead. Pet. App. 37a.

Meanwhile, "for some unexplained reason," *id.* at 45a, OCRM failed to respond to McQueen's permit application on Lot B. In a letter dated April 2, 1993, nearly two years after he submitted his original permit applications, OCRM told McQueen that "the only way to correct this confusion" was to "submit a new application." R. 353; Pet. App. 45a. So two months later, on June 4, 1993, McQueen resubmitted permit applications for both lots, which OCRM denied on September 13, 1993.[4] *Id.* at 38a; R. 283, 316. Its

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[2] *See* S.C. Code Ann. § 1-30-45(B) (1993).

[3] South Carolina law defines "bulkhead" as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (1993).

[4] Only OCRM opposed McQueen's permit applications. The United States Army Corps of Engineers, the South Carolina Department of Health and Environmental Control, the South Carolina Ports Authority, the South Carolina Department of Archives

(continued...)

stated reason for denying the permits was that "[t]he proposed bulkhead is located well into the tidelands critical area, so that any backfill results in the filling of tidal wetlands." R. 283, 316. OCRM added that "since the application seeks to fill a single family lot, there is no overridding [sic] public interest for this activity." *Id.* at 283, 316.

McQueen appealed this decision before an OCRM hearing officer. Pet. App. 38a. Following a hearing, the officer recommended that the agency issue a permit for Lot A, subject to the 75-foot setback and other restrictions placed on the permit in January 1992, but deny the permit for Lot B. *Id.* at 38a–39a. OCRM accepted these recommendations only in part, once again denying both permits. *Id.* at 46a.

McQueen then pressed his case before the Coastal Zone Management Appellate Panel, which issued a "final administrative order" on October 7, 1994. R. 17. The Panel determined that the Act "expressly prohibits the activity sought by McQueen." *Id.* at 21. In particular, the Panel relied on the following regulation: "The creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes shall be denied." *Id.* (quoting S.C. Code Regs. § 30-12G(2)(a)). The Panel also refused to find that "the action taken by this agency in denying both applications for fill amounts to an unconstitutional taking." *Id.* at 23. Relying on *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Panel reasoned that McQueen lacked "distinct investment-backed expecta-

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[4] (...continued)
and History, and the South Carolina Department of Wildlife and Marine Resources—all gave their approval for the construction of bulkheads on McQueen's property. Pet. App. 38a.

tions," because he "failed to act to protect his property" by seeking the necessary permits earlier. R. 23. And on that ground the Panel denied his takings claim. *Id.*; Pet. App. 46a.

2. McQueen then filed a complaint with the South Carolina Court of Common Pleas. *Id.* at 35a–36a; *see* S.C. Code Ann. § 48-39-180 (1994) (providing judicial review for "[a]ny applicant whose permit application has been finally denied . . . by the Coastal Zone Management Appellate Panel"). In his complaint McQueen sought "a review of the department's action 'de novo.'" *Id.*; *see* Pet. App. 40a; R. 33. He also alleged that the OCRM's permit denials were a "taking without compensation." *Id.* at 34; S.C. Code Ann. § 48-39-180; *see* Pet. App. 40a. The court referred the case to a master-in-equity.[5] *Id.* at 36a.

In his final order, issued February 28, 1996, the master ruled as a matter of law that McQueen had suffered a taking. *Id.* at 46a–47a. Two facts stood out. First, the master found that OCRM's definition of "critical area" swallowed each lot, leaving McQueen no portion of his property unaffected by the regulation. *See id.* at 40a. Second, the master found substantial evidence supporting McQueen's argument that OCRM's refusal to permit the construction of bulkheads deprived McQueen of all economically beneficial use of his property. *Id.* at 46a. The master cited the testimony of Mark Caldwell, an OCRM regional permit administrator, who admitted that the permit denial left McQueen's property with

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[5] Rule 53 of the South Carolina Rules of Civil Procedure authorizes a judge of the Court of Common Pleas to refer a case to a master "where the parties consent." S.C. R. Civ. P. 53(b). Unless the order of reference contains specific limitations on his authority, "the master has and shall exercise the power and authority of the court sitting without a jury." *Id.* at 53(c).

only "[r]ecreational, aesthetic use." R. 146; Pet. App. 40a. Caldwell further conceded that even these minimal uses supposedly left to McQueen were indirect:

> It's really probably not directly recreational. I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots. But a salt marsh contributes to, of course, the whole environment and plays its part in the production of shrimp, crabs, and so forth. If someone down on Hog Inlet is fishing, I mean, he may be using bait that he caught or shrimp that he caught out in the marsh that his particular lot, Mr. McQueen's particular lot helped spawn, so forth. It's kind of indirect.

R. 146–47. The master-in-equity also relied on the testimony of McQueen, Pet. App. 41a, who, referring to OCRM, said that "[t]hey don't even want me—they don't even want [my friend] Alex, which is the conservationist, to park a boat. They ran him off." R. 207.

The master found additional support for his conclusion that McQueen had suffered a taking by comparing this case with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet. App. 41a–42a. As in *Lucas*, "McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with." *Id.* at 41a. "Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads." *Id.* at 42a. Also, as in *Lucas*, no background principles of state nuisance or property law would have barred the challenged use of the property. "Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and

property law and would have been allowed prior to 1977," *id.* at 42a, when the Coastal Zone Management Act was enacted.

Having concluded that McQueen had suffered a taking, the master addressed how much compensation was just under the circumstances. McQueen had testified that he had received offers for his property of $50,000 per lot. *Id.* at 44a; R. 209. On that basis the master ordered OCRM to pay McQueen $100,000 compensation for both lots. Pet. App. 48a.

3. OCRM appealed to the South Carolina Court of Appeals, which affirmed in part, reversed in part, and remanded. *Id.* at 15a.

The court found that OCRM had lawfully denied McQueen's permit applications. "It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result." *Id.* at 20a.

The court also affirmed the master's ruling that OCRM's permit denials effected a categorical taking of McQueen's property. After quoting extensively from *Lucas*, *id.* at 22a–24a, the court reasoned that McQueen's claim bore "a remarkable similitude to *Lucas*." *Id.* at 24a. Following *Lucas*, the court held that because OCRM's permit denials left McQueen's property with no economically beneficial use, "McQueen has suffered a textbook taking." *Id.* at 28a.

The only point on which the court of appeals disagreed with the master-in-equity was the amount of compensation. Because the court found that McQueen's testimony standing alone was insufficient to support a compensation award of $100,000, it reversed and remanded to determine the amount of compensation. *Id.*

Judge Connor dissented in part, arguing that McQueen had failed to prove a compensable taking. In particular, Judge Connor distinguished McQueen's

case from *Lucas* on the ground that McQueen "failed to show he had 'investment-backed expectations.'" *Id.* at 34a. "McQueen knew his lots were eroding and failed to act to protect his property." *Id.*

4. The South Carolina Supreme Court reversed on the sole ground that McQueen "has failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 14a.

The court began its analysis by reciting the Fifth Amendment Takings Clause and the rule in *Lucas*: "The government 'takes' property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property." *Id.* at 4a (citing *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)). The court then wrote, "In order to recover on a regulatory takings claim, a property must establish" the three-part test described in *Loveladies Harbor*:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Id. (quoting *Loveladies Harbor*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).

The court acknowledged that McQueen had amply satisfied the first prong of the test. "It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* (emphasis added).

The court next addressed OCRM's contention that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d. 327 (S.C. 1984) supplied a defense to

McQueen's takings claim. *Carter* held that "an owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 329 (quoting *Just* v. *Marinette County*, 201 N.W.2d 761, 768 (1972)). Reasoning that this Court had expressly rejected the conclusory police power doctrine of *Carter*, the court below held that "The United States Supreme Court overruled *Carter* on the takings issue in *Lucas*." Pet. App. 9a.

The South Carolina Supreme Court then reached the decisive question: "Did respondent have distinct investment-backed expectations entitling him to compensation?" *Id.* It found that "[t]he Court of Appeals erred in failing to address this second prong of the regulatory takings test." *Id.* at 10a. The court explained why it regarded proof of investment-backed expectations as a necessary element of every regulatory takings claim. "Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop." *Id.* The court admitted that neither the *Lucas* nor *Loveladies Harbor* discussed investment-backed expectations. *Id.* However, it relied on *Good* v. *United States*, 189 F.3d 1355 (Fed Cir. 1999), where the U.S. Court of Appeals for the Federal Circuit refused to find a taking because the owner "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.* at 1363. The Federal Circuit found that Good lacked reasonable investment-backed expectations, because he had "wait[ed] seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1362. While conceding that "*Good* is distinguishable from the instant case

in various respects," the court below reasoned that the principle in *Good* "applies with equal force here." Pet. App. 13a.

The court below observed that, like the property in *Good*, McQueen's land had been subject to "at least some developmental regulation for over a century." *Id.* (citing The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994)). It next opined that "[t]his pre-existing permit requirement is relevant to respondent's investment-backed expectations." *Id.* (citation omitted). The court then drew the conclusion that McQueen's claim failed the second prong of the *Loveladies Harbor* test. "His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.*

McQueen filed a petition for rehearing, which the South Carolina Supreme Court denied on May 24, 2000. *Id.* at 49a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A SPLIT OF AUTHORITY AMONG THE LOWER COURTS

The decision below creates a deep national split of authority, which includes at least seven U.S. Courts of Appeals and state courts of last resort. Including the decision below, this conflict involves decisions of the U.S. Courts of Appeals for the Federal Circuit,[6]

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[6] The Federal Circuit is mired in internal conflict over the question presented. *Compare Good* v. *United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) *with Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000). Because *Palm Beach Isles* is the more recent case, it appears that the court is leaning in favor of McQueen's position. Moreover, the conflict we have described cannot be vitiated by the Federal Circuit acting alone.

(continued...)

the Eighth Circuit, and the Ninth Circuit, as well as the highest courts of Colorado, Massachusetts, Ohio, and South Carolina. Such a conflict particularly merits certiorari. Sup. Ct. R. 10(b).

The court below held that an owner does not suffer a compensable taking if he proves that a regulation deprives him of all economically beneficial use of his property, unless he also proves that the regulation frustrates his distinct investment-backed expectations. Pet. App. 10a. This holding accords with the decisions of at least three other courts.

In *Good* v. *United States*, 189 F.3d 1355 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit held that a property owner suffered no taking when the U.S. Army Corps of Engineers denied a permit to dredge and fill property located in the Florida Keys. *Id.* at 1363. To reach that conclusion, the court rejected Good's argument that *Lucas* had "eliminated the requirement for reasonable, investment-backed expectations, at least in cases where the challenged regulation eliminates virtually all of the economic value of the landowner's property." *Id.* at 1361. Instead, the court found that Good had not suffered a taking on the ground that he lacked investment-backed expectations in developing his property. The court reasoned that "the regulatory climate" put Good on notice that "either state or federal regulations could ultimately prevent him from building on his property." Yet Good "took no steps to obtain the required regulatory approval for seven years." *Id.* at 1362. Accordingly, the Federal Circuit held that Good's "lack of reasonable,

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[6] (...continued)
Any decision it reaches will leave at least seven decisions in conflict. And no decision by a single federal circuit can ultimately resolve a conflict that, as here, turns on the proper interpretation of this Court's case law.

investment-backed expectations defeats his takings claim as a matter of law." *Id.* at 1363.

In *Outdoor Graphics, Inc.* v. *City of Burlington*, 103 F.3d 690 (8th Cir. 1996), the U.S. Court of Appeals for the Eighth Circuit addressed whether a municipal ordinance mandating the removal of billboards from residential neighborhoods gave rise to a taking. *Id.* at 692. The court reasoned that *Lucas* requires a property owner to demonstrate that the regulation disappointed his investment-backed expectations, "even if a regulation denies a landowner all economically productive use of the land." *Id.* at 694. The court found that Outdoor Graphics lacked reasonable investment-backed expectations, because it had "knowingly purchased property that had been subject to a nonconforming use for a prolonged period." *Id.* Given that finding, the court thought it unnecessary to "decide whether the regulation at issue completely destroyed the economic value of Outdoor's property." *Id.*

In *State of Colorado, Department of Health* v. *The Mill*, 887 P.2d 993 (Colo. 1994), the Supreme Court of Colorado addressed whether restrictions imposed by the Colorado Department of Health on The Mill's use of land contaminated with radioactive uranium tailings constituted a taking under *Lucas*. *Id.* at 999. The court agreed that the challenged uses of the property created no nuisance. *Id.* at 1002 n.9. Nonetheless, it held that the property restrictions did not constitute a taking for the single reason that the owner lacked reasonable expectations in using the property in the manner forbidden by the State. Indeed, the court found The Mill's lack of reasonable expectations "'so overwhelming' as to dispose of the taking issue for purposes of determining just compensation." *Id.* at 1002 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). As in *Outdoor Graphics*, once the court determined that

the owner lacked reasonable investment-backed expectations, it saw no need to address "whether CDH 'regulation' destroyed all economic value in the property." *Id.* at 1002 n.8. Its inquiry into the owner's "reasonable expectations" not only gave the court its sole reason for denying the regulatory taking claim under *Lucas*, but also a reason to avoid the key question under *Lucas*, namely whether the regulation was totally confiscatory.

Arrayed against *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below are four decisions holding that, under *Lucas*, an owner who proves that a regulation is totally confiscatory has suffered a taking. These decisions expressly hold that reasonable investment-backed expectations are irrelevant to deciding *Lucas* claims or simply find that the owner has suffered a taking without considering his reasonable investment-backed expectations.

In *Palm Beach Isles Associates* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000) (pending on petitions for rehearing and rehearing *en banc*), a group of investors challenged the U.S. Army Corps of Engineers' denial of a permit to dredge and fill 50-odd acres of wetlands and submerged land. *Id.* at 1377. The Federal Circuit began its analysis by quoting the same three-part test from *Loveladies Harbor* that the lower court relied on in this case. *Compare id.* at 1379 *with* Pet. App. 4a. In contrast with the decision below, the Federal Circuit underscored that not every part of the test applied to every regulatory takings claim. "[W]hen the analysis of prong (1) reveals that the regulatory imposition has deprived the owner of *all* economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under prong (3)," 208 F.3d at 1379, based on property or nuisance law. Applying this understanding of the law, the Federal Circuit ruled that "the facts are

uncontrovertible that the permit denial has the effect of denying the property owner *all* economically viable use of the property," *id.* at 1381, and that the United States lacked any defense under state property or nuisance law.[7] The court inferred that "the denial by the Corps of the permits constitutes a categorical taking." *Id.* The court then stated that "[s]ince there is a categorical taking of the 50.7 acres, the issue of [the claimant's] investment-backed expectations under prong (2) of the *Loveladies Harbor* analysis is *not applicable*." *Id.* (emphasis added). Thus the Federal Circuit expressly held that an owner need not prove that a regulation interferes with his reasonable investment-backed expectations if he has already proven that the regulation deprives him of all economically beneficial use of his property.

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds sub nom. City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), a property development company brought an action under 42 U.S.C. § 1983 against Monterey. 95 F.3d at 1425. The company asserted claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, alleging that the city had imposed a taking when it refused to allow multi-unit residential housing to be built on a 37-acre lot of ocean-front property. *Id.* Reviewing a denial of the city's motion for judgment notwithstanding the verdict, the Ninth Circuit considered whether "[t]he jury also could have found the City liable for a taking because it denied Del Monte all economically viable

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[7] The court remanded, however, to "determine whether the Government had bona fide navigational grounds for its permit denial." 208 F.3d at 1386. Only on such a showing, said the court, would the government "have sustained its defense under *Lucas*." *Id.* Otherwise, the government would owe compensation. *Id.*

use of its property." *Id.* at 1432. Emphasizing that "[w]here such a taking is absolute, no inquiry into the state's interests advanced in support of the regulation is required," *id.*, the court upheld the jury's verdict for the owner. *Id.* at 1434. Nowhere in its discussion of Del Monte's *Lucas* claim did the Ninth Circuit mention the phrase "investment-backed expectations," except in the following sentence: "The Supreme Court has suggested that where an owner is denied *only some* economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations." *Id.* at 1432 (emphasis added). Contrary to the court below, the Ninth Circuit held that an owner suffered a taking under *Lucas* without inquiring into the owner's reasonable or distinct investment-backed expectations.[8]

In *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Judicial Court faced a similar case, on remand from this Court "for further consideration in light of" *Lucas*. *Lopes* v. *Peabody*, 507 U.S. 981 (1993). At issue in *Lopes* was the validity under the Takings Clause of a municipal zoning ordinance that restricted construction of new buildings within a "wetlands conservancy district." 629 N.E.2d at 1313. The parties stipulated that the ordinance, as applied, left the owner "unable to use his land." *Id.* at 1314. But the court found that

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[8] Recently the Ninth Circuit confirmed its view that *Lucas* does not require a court to consider the owner's investment-backed expectations. In *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert denied*, 525 U.S. 923 (1998), the court described *Lucas* in the following way: "In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and *no balancing of other factors commonly analyzed in takings law—reasonable investment-backed expectations and legitimate government interests—would be necessary*." 136 F.3d at 1228 (emphasis added).

stipulation insufficient and remanded to determine "whether application of the ordinance has caused the Lopes land to have no economically beneficial use." *Id.* at 1315. The court held that the consequences of such a finding were clear: "If the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the *Lucas* opinion advises us that there is a categorical regulatory taking, unless under the land use law of the Commonwealth the proposed use would be a nuisance or otherwise impermissible." *Id.* at 1316. *Lopes* thus omitted any consideration of investment-backed expectations when determining whether the owner had suffered a categorical taking under *Lucas*.[9]

In *State ex rel. Pizza* v. *Rezcallah*, 702 N.E.2d 81 (Ohio 1998), the Ohio Supreme Court consolidated three cases where residents were arrested for felony violations of State drug laws and where, despite the owners' good faith efforts to prevent and stamp out such criminal activity, the State brought actions against them for maintaining a public nuisance. *Id.* at 85. At issue was a regulatory takings challenge to a statutory provision that required a court, on finding that a certain place posed a public nuisance, to issue an order "directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released." *Id.*

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[9] Not surprisingly, the *Lopes* court's close attention to *Lucas* was outcome-determinative. On remand the Land Court ruled that the zoning regulation had caused Lopes to suffer a temporary taking. *See Lopes* v. *City of Peabody*, 718 N.E.2d 846, 849 (Mass. 1999). That ruling was affirmed on appeal, when the Massachusetts Supreme Judicial Court held that Lopes could claim reimbursement of the real estate taxes paid during the period of the taking, given that "a compensable temporary regulatory taking took place from 1981 to 1995, and that there was no economically beneficial use of the property during that time." *Id.* at 851 (footnote omitted).

at 87 (quoting Ohio Rev. Code Ann. § 3767.06(A)). Relying on *Lucas*, the Ohio Supreme Court held that "padlocking an owner's property, effectively closing it against all uses for a year, is a taking, albeit temporary in nature," *id.* at 89, and that the statute's "mandatory closure provisions . . . violate the Takings Clause of the Fifth Amendment to the United States Constitution when imposed against an innocent owner." *Id.* at 93. Contrary to the decision below, the question of investment-backed expectations played no role in the court's analysis.

The conflict between *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below on one side and *Palm Beach Isles*, *Del Monte Dunes*, *Lopes*, and *Rezcallah* on the other is striking and genuine. In each case an owner brought a claim under the Takings Clause, alleging that he had suffered a categorical taking as defined in *Lucas* due to a restriction placed by the government on his use of real property. In one line of cases courts rejected categorical takings claims under *Lucas* solely because they concluded that the owner had failed to show that the regulation interfered with his distinct or reasonable investment-backed expectations. However, in the other line of cases courts upheld categorical taking claims, while either expressly finding investment-backed expectations irrelevant or omitting that inquiry from consideration altogether. McQueen would therefore be entitled to compensation under the rule followed in *Palm Beach Isles*, *Del Monte Dunes*, *Lopes*, and *Rezcallah* but not under the rule followed in *Good*, *Outdoor Graphics*, *The Mill*, and the judgment below. This conflict includes federal circuits and state courts of last resort from around the country and decisions stretching from 1994 to 2000. Because it presents a deep national conflict of authority among the lower courts, the judgment below deserves this Court's review.

In addition to the out-and-out conflicts we have identified, review is warranted because the decision below typifies the confusion afflicting many lower courts over the correct interpretation and application of *Lucas*. For instance, several courts have interpreted *Lucas* to mean that an owner suffers a compensable regulatory taking *only* if he can show that the regulation deprives him of all economically beneficial use. *See, e.g.*, *Kudloff* v. *City of Billings*, 860 P.2d 140, 142 (Mont. 1993); *McFillan* v. *Berkeley County Planning Comm'n*, 438 S.E.2d 801, 809–10 (W. Va. 1993); *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 531–32 (Wis. 1996). Such confusion, standing alone, has prompted the Court to grant review before. *See, e.g.*, *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 146–47 (1999).

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S REGULATORY TAKINGS DECISIONS

A. *Lucas* v. *South Carolina Coastal Council*

Certiorari is also merited in this case because the decision below conflicts with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Sup. Ct. R. 10(c). Such a conflict has been the sole reason for granting review in regulatory takings cases. *See Dolan* v. *City of Tigard*, 512 U.S. 374, 383 (1994). Indeed, "[a] conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a *strong reason* for the granting of certiorari." Robert L. Stern, et al., Supreme Court Practice 208 (7th ed. 1993) (emphasis added).

The Court's holding in *Lucas* is clear. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically

antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Even Members of the Court who dissented from the majority's decision in *Lucas* expressed no doubt that this holding prescribes a categorical rule and a single, narrow exception. Justice Blackmun wrote, "From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle." *Id.* at 1046–47 (Blackmun, J., dissenting). Justice Stevens agreed. "Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights." *Id.* at 1063 (Stevens, J., dissenting). Neither majority nor dissenting opinions suggested, as the court below held, *see* Pet App. 10a, that an owner who proves that a regulation deprives him of all economically beneficial use of his property has not suffered a compensable taking, unless he can also show that the regulation frustrates his distinct or reasonable investment-backed expectations.

The conflict between the decision below and this Court's decision in *Lucas* is magnified, given this case's "remarkable similitude to *Lucas*." *Id.* at 24a. Like David Lucas, Sam McQueen bought two lots of residential property along the South Carolina coast. *See* 505 U.S. at 1006; Pet. App. 45a. Like Lucas, McQueen sought to use his property for single-family residences, just as his neighbors had done. *See* 505 U.S. at 1007; Pet. App. 37a. Like Lucas, McQueen's plans were stopped cold by a regulatory framework erected after he acquired the property. *See* 505 U.S. at 1007; Pet. App. 45a; R. 283, 316. Like Lucas, McQueen consequently suffered the loss of all economically beneficial use of his property. *See* 505 U.S. at 1007; Pet. App. 46a. And like Lucas, the

State has been unable to "identify background principles of nuisance and property law," 505 U.S. at 1031, that would sustain its regulatory action without compensation. *See Lucas* v. *South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992); Pet. App. 9a. With such close factual and legal similarities, the contrary decisions of the Court in *Lucas* and the court below present a direct conflict.

This conflict results from the lower court's reliance on the Federal Circuit's decisions in *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994) and *Good* v. *United States*, 189 F.3d 1355 (Fed. Cir. 1999). The court below chiefly took its bearings from *Loveladies Harbor* as the decision prescribing what "a property owner *must* establish" in every regulatory takings case. Pet. App. 4a (emphasis added). *Good*, on the other hand, served as the lower court's precedential support for its remarkable conclusion that a property owner who acquires property without notice of a regulatory prohibition nonetheless lacks investment-backed expectations in that property if he fails to promptly seek development permits when they become legally available. *See id.* at 10a–13a. Accordingly, the court below declared that "[w]hile *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here." *Id.* at 13a.

Relying on *Loveladies Harbor* and *Good* misled the court below into issuing a decision in direct conflict with *Lucas*. *Lucas* mandates compensation for confiscatory regulations, so long as the owner possessed the challenged use as part of his title, 505 U.S. at 1027; the decision below mandates compensation only when the owner can show reasonable or distinct investment-backed expectations, as well. Pet. App. 10a. Hence the lower court not only erred, but produced a decision utterly

irreconcilable with *Lucas*. If the surest test of an asserted conflict is whether a different court would have reached a contrary result given the same facts, that test is amply satisfied here. It is difficult to imagine the court that decided *Lucas* turning away Mr. McQueen empty-handed.

B. Other Regulatory Takings Decisions

The decision below is also inconsistent with other decisions by this Court interpreting the Takings Clause. Contrary to several of those decisions, the court below added "investment-backed expectations" to the categorical rule applied in *Lucas* and then gave that element sufficient power to defeat even a categorical takings claim founded on undisputed evidence that a regulation is totally confiscatory. Grafting "investment-backed expectations" onto the categorical takings rule of *Lucas* obliterates the distinction between categorical and "ad hoc" takings. In *Lucas*, the Court described two circumstances where categorical treatment is warranted, in contrast with the "essentially ad hoc, factual inquiries," *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978), that ordinarily characterize regulatory takings cases. One such circumstance is governed by "the traditional rule that a permanent physical occupation of property is a taking." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Another circumstance involves the "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Aside from these circumstances, judicial inquiry is guided by several factors, including but not limited to "the character of the governmental action," its "economic impact," and its interference with "distinct investment-backed expectations." *Penn Central*, 438 U.S. 104, 124 (1978). Importing "distinct investment-backed expectations" into *Lucas* transforms what was

a categorical rule into an uncertain hybrid of categorical and *ad hoc* elements. With that a key distinction around which the Court has built its Fifth Amendment jurisprudence is destroyed. But the lower court's decision not only adds a superfluous element to the *Lucas* test for confiscatory regulations, it gives that new element sufficient power to single-handedly defeat a total takings claim. This creates a new class of categorical *non*-takings, wholly at odds with this Court's Fifth Amendment precedent.

The judgment below also produces harsh and unjust results, which are inconsistent with this Court's settled understanding of the Constitution. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Here Mr. McQueen, alone among his neighbors, has been denied permits to put up bulkheads on his property. Pet. App. 2a, 37a. Not only do those permit denials render his property economically useless—by the government's own admission McQueen's land is now good for nothing but spawning shrimp and fish bait for the local ecosystem, *see* R. 146–47—but he must keep paying taxes on property now forced into public service. *See Lucas*, 505 U.S. at 1017. Because McQueen has been compelled to shoulder the burden of protecting coastal wetlands, purportedly for the good of the entire State, *see* S.C. Code Ann. § 48-39-30(A) (1993), the lower court rendered a judgment in conflict with this Court's precedent when it denied him compensation.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT ONLY THIS COURT CAN FINALLY RESOLVE

Review should also be granted because the question presented is a recurring issue of national importance that only this court can finally resolve. The importance of the issue has often been expressed as a reason for granting review in regulatory takings cases. *See, e.g.*, *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 519 (1998); *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 274 (1981); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 166 (1979); *United States* v. *Causby*, 328 U.S. 256, 258 (1946). In two recent regulatory takings cases where review was denied, Members of the Court wrote separately to say that they would have granted review because of the importance of the issues alone, even without any conflicting authority. *See Lambert* v. *City and County of San Francisco*, 120 S. Ct. 1549, 1552 (2000) (Scalia, J., joined by Kennedy and Thomas, J.J., dissenting from denial of *certiorari*); *Parking Assoc. of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of *certiorari*).

Not only is the question presented intrinsically important by virtue of its role in constitutional law, but it is significant because it can be expected to recur frequently. It could determine the outcome of every claim brought under *Lucas*. This forms a substantial body of litigation, as a representative sample of only the past year's reported case law suggests. *See, e.g.*, *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000); *Palm Beach Isles Assoc.* v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Palazzolo* v. *Rhode Island*, 746 A.2d 707 (R.I. 2000); *District Intown*

Properties Ltd. Partnership v. *District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999); *Cooley* v. *United States*, 46 Fed. Cl. 538 (Fed. Cl. 2000); *Boise Cascade Corp.* v. *Oregon*, 991 P.2d 563 (Or. Ct. App. 1999); *City of Seattle* v. *McCoy*, 4 P.3d 159 (Wash. Ct. App. 2000). That categorical takings claims under *Lucas* are raised so frequently should come as no surprise. Regulatory takings cases in general are "among the most litigated and perplexing in current law," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

More importantly, such litigation-spawning perplexity arises in this case from a dispute over the correct interpretation and application of one of this Court's own decisions. Unlike novel issues of statutory or constitutional interpretation, where extended percolation in the lower courts may confer deliberative benefits, no such benefits accrue when, as here, the dispute turns on the proper meaning of this Court's decisional law. And even if percolation were thought desirable, nine years is ample time for lower courts to muddle through when the point in doubt is as fundamental as the question presented. Only this Court can put an end to the conflict and confusion that we have described.

IV. THIS CASE PRESENTS AN UNUSUALLY SUITABLE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Several reasons favor granting review in this case rather than awaiting another vehicle to resolve the question presented. Jurisdiction clearly lies with the Court and McQueen has standing to bring this action. No factual disputes or procedural doubts prevent the Court from squarely addressing the question presented, and a decision on the merits for McQueen would provide him complete relief.

No relevant factual disputes divide the parties at this stage of the proceedings. The South Carolina Supreme Court conceded as much when it wrote, "It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property." Pet. App. 4a (emphasis added). Under *Lucas*, a property owner who has proved that fact gets compensation, unless the government can mount a defense under "background principles of nuisance and property law." 505 U.S. at 1031. OCRM failed to do this when the lower court rejected its argument that *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d. 201 (S.C. 1984) supplied such principles. Pet. App. 9a. Absent such factual disputes, this case presents a pure question of law.

This case labors under none of the technical disputes typical of regulatory takings cases. McQueen's claim is ripe. Given the Coastal Zone Management Appellate Panel's final order denying McQueen's permit applications, Pet. App. 46a, "there [is] no question here about how the 'regulations at issue [apply] to the particular land in question." *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985)). And no denominator problem, *see Lucas*, 505 U.S. at 1016 n.7, lurks in the background. The master-in-equity ruled that OCRM's permit denials affected the entire portion of each lot belonging to Mr. McQueen. Pet. App. 40a.

The judgment below is a final judgment that rests on a single ground of decision. *See* Pet. App. 13a–14a. Unless this Court intervenes, no further proceedings will be held in the South Carolina courts in this case. A judgment by this Court in favor of Mr. McQueen would offer him complete relief.

Finally, the decision below was no aberration. Already the lower court has relied on that decision

to deny a regulatory taking claim based on the owner's purported lack of distinct or reasonable investment-backed expectations. In *Westside Quik Shop, Inc.* v. *Stewart*, 2000 S.C. LEXIS 151 (S.C. June 21, 2000), the court cited the decision below for the proposition that "even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Id.* at *14. Given such swift and unmistakable reliance on the decision below for exactly the proposition contested by Mr. McQueen here, it is unlikely that that decision reflects anything other than the lower court's fixed determination to apply its understanding of *Lucas* at every available opportunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2000

APPENDIX

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Petitioner.

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity.

Opinion No. 25108

February 3, 2000, Heard
April 17, 2000, Filed

BURNETT, A.J.: Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are located on manmade,

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations,

as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen*, 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to Lucas. David Lucas purchased two

coastal tracts in 1986 for $975,000, with the intent to build single-family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-250 *et. seq.* (Supp. 1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas*, 505 U.S. at 1006–07. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground—a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time of purchase." *Id.* We do not think this is a valid assumption.[2]

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property

(continued...)

Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

> Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031. We disagree.

In *Carter*, we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "an owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit

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[2] (...continued)
below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.*, 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman*, 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct. App. 1984) (citing *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

denial there was a valid exercise of the State's police power to prevent public harm. 281 S.C. at 204–05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (Wis. 1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas*. *See, e.g.*, Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1, 46 & n.260 (1995) (*Just* is a background principle), Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 Land & Water L. Rev. 425, 447 & n.138. (1993) (same);[3] *but see* Joseph L. Sax, *Property Rights & the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1440 (1993) (arguing the *Lucas* Court "repudiated the conclusion of *Just*"), Richard Ausness, *Regulatory Taking & Wetland Protection in the Post*-Lucas *Era*, 30 Land & Water L. Rev. 349, 403–04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the 'natural' character of their land.") (citing *Carter*, *inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n.2.

property law that survives *Lucas*.[4] Our opinion in the first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas* case. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter*."). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter*. *Id.* at n.4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists

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[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha*, 201 Wis.2d 365, 548 N.W.2d 528, 534 (Wis. 1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "nothing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States*, 39 Fed. Cl. 81, 98 & n.30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059–60 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he thought *Just* fell into the exception carved out by the majority for background principles of state law.

by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just*, the United States Supreme Court repudiated the reasoning of *Just* in *Lucas*:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, *by requiring land to be left substantially in its natural state*—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018 (emphasis added). The *Lucas* decision made clear the State "must do more than proffer . . . the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."[6] *Lucas*, 505 U.S. at 1031. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas*. *McQueen*, 329 S.C. at 597, 496 S.E.2d at 648.

> B. Did respondent have distinct investment-backed expectations entitling him to compensation?

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[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202–04, 314 S.E.2d at 328–29.

[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed. 1990).

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), *Mibbs v. South Carolina Dep't of Revenue*, ___ S.C. ___, 524 S.E.2d 626 (1999). Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop. This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor*, 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor*. *Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first

permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla. Stat. Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard. *Id.* at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988

allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1358–59.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1359.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C. § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the

federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.* (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361–62. The court stated that "while [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While Good is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed expectations. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 75–76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land

he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we REVERSE.

TOAL, A.C.J., MOORE, WALLER, JJ., and Acting Justice R. Markley Dennis, Jr., concur.

COURT OF APPEALS OF SOUTH CAROLINA

Sam B. McQueen, Respondent

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Appellant.

Opinion No. 2779

December 2, 1997, Heard
January 12, 1998, Filed

As Corrected February 12, 1998.
Rehearing Denied March 19, 1998.

ANDERSON, J.: Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in part, reverse in part, and remand.

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(i)(b) (Supp. 1996).

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on man-made, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and

neighbors wrote to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 1996), which provides that the creation of residential lots for private gain

is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C. Code Ann. § 48-39-180 (Supp. 1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner*, 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544 (1960)). "The substantial evidence standard . . . is the proper standard for review of actions by the Coastal Council." 276 S.C. at 523–24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia*, that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements . . . to act upon applications within 90 days of the filing." The master noted the

significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness, or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Whatever doesn't make any difference, doesn't matter."); *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant*, 319 S.C. 348, 461 S.E.2d 388; *Carter*, 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision based on salt-tolerant vegetation found growing on the lots, *e.g.*, *borrichia frutescens* and

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C. Code Ann. § 48-39-10(3) (Supp. 1996). "Coastal wetlands" means "those areas periodically inundated by saline waters and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C. Code Ann. § 48-39-10(G) (Supp. 1996).

spartina alterniflora, which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council*, infra: Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "to promote economic and social improvement of the citizens of this State" while "protecting the sensitive and fragile areas from inappropriate development and providing adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C. Code Ann. § 48-39-30(1) (Supp. 1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), wherein the Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 79 U.S. 457, 12 Wall. 457, 551, 20 L. Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago,* 99 U.S. 635, 642, 25 L. Ed. 336 (1879). *See also Gibson v. United States,* 166 U.S. 269, 275–276, 17 S. Ct. 578, 580, 41 L. Ed. 996 (1897). Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414–415, 43 S. Ct. at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared." *Id.*, at 415, 43 S. Ct. at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*
>
> Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of

the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S. Ct. 987, 990, 8 L. Ed. 2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins* [*v. City of Tiburon*], 447 U.S. [255] at 260[, 65 L. Ed. 2d 106, 100 S. Ct. 2138]; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S. Ct. 1232, 1247, 94 L. Ed. 2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264,

> 295–296, 101 S. Ct. 2352, 2370, 69 L. Ed. 2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S. at 260, 100 S. Ct. at 2141 (citations omitted) (emphasis added).

505 U.S. at 1014–16.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its *Lucas* opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas*.

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable

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[4] In *Carter*, the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas*:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413, 43 S. Ct. at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66–67, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow

> held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. [419] at 426, 102 S. Ct. [3164] at 3171[, 73 L. Ed. 2d 868]—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027–29.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas*, 505 U.S. at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen

wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred.

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficultly in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything with either lot, including park a boat on one. The only use of the land available to McQueen

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

after the permit denials the Council could show was "recreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina Highway Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth*, 124 F.3d 632 (4th Cir. 1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs. CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.): I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes. Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall. The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish." The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[1]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

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[1] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas*, 505 U.S. at 1006. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007. The United States Supreme Court held Lucas' ability to build on his property was contained in the "bundle of rights" he acquired when he first bought the property. *Id.* at 1027. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas*." It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their

property. However, McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright-line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas*, 505 U.S. at 1031. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031 (emphasis added). See also 106 Harv. L. Rev. 163 at 272–73 (1992). ("Regulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[2]

In *Lucas*, Justice Scalia quoted Lord Coke, who said, "what is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017 (quoting 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. Ed. 1812)). In 1994, the Federal Circuit of the United States Court of Appeals, interpreting *Lucas* in light of the entire history of

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[2] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *See also Property Myths, Judicial Activism, And The Lucas Case*, 23 Envtl. L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, *Lucas* is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "this lot, by the passage of *time* and *tides for* the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas*: "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031. However, the omitted phrase reads as follows: "Though changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor*. As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment." I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become so critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

Order of February 28, 1996

STATE OF SOUTH CAROLINA COUNTY OF HORRY	) IN THE COURT OF) COMMON PLEAS) FIFTEENTH JUDICIAL CIRCUIT) Case No. 94-CP-26-3154	
SAM B. MCQUEEN, Plaintiff,	)	
-VS-	)	FINAL ORDER
SOUTH CAROLINA COASTAL COUNCIL, n/k/a/ SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made canals and were created by fill. The lots are Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter

came before this Court on January 5, 1996, for review pursuant to § 48-39-180, *Code of Laws of South Carolina*. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the Unite States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean of Coastal Resource Management (hereinafter OCRM), for two permits, one for each

lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. § 48-39-150(c), *Code of Laws of South Carolina*. The testimony at the evidentiary hearing, however, reveals that Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2–24; page 23, lines 18–25; page 24, lines 1–2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2–5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted

that Mr. McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corps of Engineers, the S.C. Department of Health and Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue

and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sought review of the OCRM's action "de novo" pursuant to § 48-39-180, *Code of Laws of South Carolina*. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sought to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, § 48-39-30(c), *Code of Laws of South Carolina*, and § 48-39-180, *Code of Laws of South Carolina*, requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. *The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property under the Fifth and Fourteenth Amendments of the U.S. Constitution Requiring the Payment of Just Compensation.*

Plaintiff, Sam McQueen, is entitled to just compensation to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§ 48-39-30 and 48-39-180, *Code of Laws of South Carolina*. See *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. US 119 L. Ed. 2d 561 and rev'd US 120 L. Ed. 2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina*

Coastal Council (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992 decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of the common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, supra, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13–25; page 20, lines 1–6). Mr. Chinnis

confirmed this. (TR page 72, lines 23–25; page 73, lines 1–8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1–6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be paid to sustain it. The state may not transform private property into public property without compensation." *Lucas*, supra.

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963, before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been

able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that . . . the Act is taking nothing." *Lucas*, supra, p. 2902. Without question, the use for which Mr. McQueen now intends would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, ___ S.C. ___, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could *not* uncover any such common law principle. *Lucas*, supra.

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property in 1987, after the 1977 Act, and the property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The

distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a three prong test for determining if there has been a regulatory taking.

> 1) If there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> 2) the property owner had distinct investment-backed expectations; and
>
> 3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision

to seek a permit is insufficient to conclude that the property owner had no investment-backed expectations. In addition, the Defendant failed to submit any evidence to support this argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, lines 11–13). The law is clear that a property owner can offer testimony as to the value of his property. The OCRM did not offer any testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under

the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, the OCRM did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the Plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) I find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as set forth in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436,

motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his

applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L. Ed. 2d 455, 112 S. Ct. 436, motion gr. U.S. 119 L. Ed. 2d 561, rev'd U.S. 120 L. Ed. 2d 798 (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this Order.

AND IT IS SO ORDERED.

s/ John L. Breeden, Jr.
Master In Equity

Dated: February 28, 1996
Conway, South Carolina

THE SUPREME COURT OF SOUTH CAROLINA

May 24, 2000

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council,
n/k/a South Carolina Department of Health
and Environmental Control, Office of Ocean
and Coastal Resource Management, Petitioner.

On Writ of Certiorari to The Court of Appeals

Appeal From Horry County
John L. Breeden, Jr., Master-in-Equity.

Opinion No. 25108

Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.